IN THE SUPREME COURT OF FLORIDA

THOMAS WYATT,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 79,245

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Nineteenth Judicial Circuit of Florida.

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AUTHORITIES CITED

ARGUMENT

I. GUILT PHASE

A. JURY INSTRUCTION ON FLIGHT

The objection at bar was as good as the one in Fenelon v. State, 549 So. 2d 292 (Fla. 1992). Mr. Fenelon's objection was: "I, of course, object to that flight instruction." (A copy of the state's brief in Fenelon and the relevant transcript pages is attached to this brief.)[1] As in Fenelon, the court was aware of the objection and overruled it. The issue is preserved.[2]

Further, Florida did not apply its procedural default rule consistently during the time of Mr. Wyatt's trial,[3] so that it would be improper to apply it here. Ford v. Georgia, 111 S.Ct. 850 (1991),

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[1] See also Thomas v. State, 419 So. 2d 634, 635 (Fla. 1982) in which the Court held that the following preserved for appeal an issue regarding prosecutor's argument:

> Mr. Large [defense counsel]: Objection, Your Honor. I have a motion to make.
>
> The Court: Motion overruled.
>
> Mr. Large: Can I make the motion after the jury is excused?
>
> The Court: Denied.

[2] Smith v. State, 598 So. 2d 1063 (Fla. 1992) defeats the state's claim that Fenelon does not apply at bar. See, e.g., Keys v. State, 606 So. 2d 669 (Fla. 1st DCA 1992) (retrospective application of Fenelon required by Smith), Bryant v. State, 602 So. 2d 966 (Fla. 3rd DCA 1992) (same), Lewis v. State, No. 92-433 (Fla. 4th DCA Aug. 25, 1993) (en banc) (same).

[3] E.g. Occhicone v. State, 18 Fla. L. Weekly S235, S236 (Fla. April 8, 1993) ("We could have, and probably should have, also said [in the 1990 direct appeal decision] that the claim was procedurally barred because of no objection at the trial court level."); Hodges v. State, 619 So. 2d 272, 273 (Fla. 1993) ("We summarily found the issue meritless [in the original opinion], but we should have held it procedurally barred because Hodges did not preserve it for review by objecting at trial.").

James v. Kentucky, 466 U.S. 341 (1984), Smith v. Black, 970 F.2d 1383 (5th Cir. 1992), Wilcher v. Hargett, 978 F.2d 872 (5th Cir. 1992).

As the beneficiary of error, the state must show beyond reasonable doubt that it did not contribute to the verdict. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), Chapman v. California, 386 U.S. 18 (1967). "Harmless-error review looks, we have said, to the basis on which 'the jury actually rested its verdict.' Yates v. Evatt, 500 U.S. ___, ___, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan v. Louisiana, 113 S.Ct. 2078, 2081-82 (1993) (emphasis in original). The state must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. 2081 (quoting Chapman). "[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials". Yates, 111 S.Ct. at 1898 (Scalia, J., concurring) (quoting Bollenbach v. United States, 326 U.S. 607, 614 (1946)).

The state has made no effort to show that the instruction did not contribute to the verdict. It is presumed that the jury took the instruction to heart and used it to infer consciousness of guilt. Hence, reversal is required.

B. CROSS-EXAMINATION OF MR. WYATT

It is false for the state to say there was no objection to the cross-examination. The defense objections were overruled. R 1756, 1759. It was not necessary to renew the objection futilely as cross-

examination continued. See Brown v. State, 206 So. 2d 377, 384 (Fla. 1968), Whitted v. State, 362 So. 2d 668, 672 (Fla. 1978), Hunt v. State, 613 So. 2d 893, 898, n.2 (Fla. 1992), Spurlock v. State, 420 So. 2d 875 (Fla. 1982), Simpson v. State, 418 So. 2d 984 (Fla. 1982), Thomas v. State, 419 So. 2d 634 (Fla. 1982).[4]

In its brief, the state cited Gelabert v. State, 407 So. 2d 1007, 1009 (Fla. 5th DCA 1981) for the proposition that the trial court "has wide discretion" regarding the scope of cross-examination. Actually Gelabert said: "The right to ask any particular question on cross-examination when it relates to a collateral matter is normally within the discretion of the trial court." It did not say "wide" and it said only "normally." Anyway, the state has not shown that the trial court has discretion to ignore the rules of evidence. The cross-examination was improper. The state makes no effort to distinguish the cases cited in the initial brief.

While the state, in argument, may point out inconsistencies in the evidence, it has pointed to no case supporting the use of cross-examination to make the defendant part of such argument.[5]

C. LIMITATION OF DISCOVERY

The state makes the interesting argument that defense counsel sought to question the witness at deposition for discovery purposes, as though this were an improper use of discovery depositions. The identity of her drug supplier was a matter reasonably calculated to

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[4] Actually, no objection was required at the time of this trial. Hernandez v. State, 575 So. 2d 1321 (Fla. 4th DCA 1991) (reversing notwithstanding lack of objection by defense), approved on other grounds 596 So. 2d 671 (Fla. 1992).

[5] Here the cases cited by the state fall flat: Kramer v. State, 18 Fla. L. Weekly S 266 (Fla. April 29, 1993) and Wasko v. State, 505 So. 2d 1314 (Fla. 1987) dealt only with argument.

lead to relevant evidence regarding her degree of drug usage around the time in question. The state cites Edwards v. State, 548 So. 2d 656 (Fla. 1989), to no apparent purpose. Edwards says the defense may question a witness about his use of drugs, but has nothing to do with discovery. Without sufficient discovery, defense counsel could not competently question this important witness on this subject. As for the state's other cases, Boshears v. State, 371 So. 2d 725 (Fla. 1st DCA 1979) is so short as to shed no light on the case at bar, and Lane v. State, 457 So. 2d 586 (Fla. 3rd DCA 1984) did not involve a discovery issue.

D. LIMITATION OF VOIR DIRE

Stano v. State, 473 So. 2d 1282, upon which the state relies, is inapposite. It involved repetitious questioning about publicity. Smith v. State, 253 So. 2d 465 (Fla. 1st DCA 1971), forbade questioning veniremen "as to the kind of verdict they would render under any given state of facts or circumstances." What the state did below is contrary to Smith. Thus the trial court erred in overruling the defense objection. What then happened was worse: the court forbade defense questioning of jurors as to what kind of cases they would find appropriate for a death sentence. The state cannot have its cake and eat it too. To the extent that it is to the contrary, Smith was overruled by Lavado v. State, 492 So. 2d 1322 (Fla. 1986).

E. USE OF AUTOPSY PHOTOGRAPH

Under the state's case of Thompson v. State, 619 So. 2d 261, 266 (Fla. 1993), gruesome photographs are to be admitted only where "essential." Except by citing to Thompson, the state has made no meaningful argument that the photograph made no contribution to the

verdict. The state had a difficult case and every bit of improper evidence helped it on its way.

F. LIMITATION OF CROSS-EXAMINATION

If Smith says he saw Jones, it is proper to cross-examine him about his memory: What was Jones wearing, what did he do, how did he act? Thus the questioning of Mr. Schlemer about Mr. Fox was proper. The state's case of Jones v. State, 440 So. 2d 570 (Fla. 1983) hardly refutes this simple proposition. In Jones direct examination involved events before the police arrived, and the proposed cross-examination involved matters after the police arrived.

The state makes but a half-hearted claim that the error was harmless, asserting that Mr. Wyatt had failed to show harm. Under State v. DiGuilio, the state must make a positive showing that the error did not contribute to the verdict. Mr. Fox's self-serving testimony hardly cured the error. Hence Morgan v. State, 415 So. 2d 6 (Fla. 1982) is beside the point.

G. JUDICIAL MISCONDUCT

Jones v. State, 612 So. 2d 1370 (Fla. 1992), cited by the state, is beside the point. It involved comments on the evidence and calling a witness by first name. At bar, the trial court directly expressed disapproval of the defendant and his counsel.

H. IMPROPER CHARACTER EVIDENCE

Straight v. State, 397 So. 2d 903 (Fla. 1981) and Padilla v. State, 618 So. 2d 165 (Fla. 1993), cited by the state, are irrelevant to the state's use of Mr. Wyatt's post-arrest statement to Officer Robinson. Straight involved evidence that the defendant fled from, and fired at, law enforcement officers, and Padilla involved shots fired at the victim's former apartment. The state makes no claim that this

evidence was harmless. See U.S. v. Giovanetti, 928 F.2d 225 (7th Cir. 1991) ("we decline to relieve the government from the consequences of its failure to raise the issue of harmless error in its brief on appeal"). See also Carter v. Kentucky, 450 U.S. 288, 304 (1981) (state could not raise in Supreme Court harmless error argument where it did not make argument in state supreme court.), Cannady v. State, 18 Fla. L. Weekly S277 (Fla. May 6, 1993), Omelus v. State, 584 So. 2d 563 (Fla. 1991). See also Henry v. State, 496 So. 2d 832 (Fla. 2nd DCA 1986).

Mr. Wyatt's argument with his employer hardly showed repeated attempts to flee the police, so the state's cases[6] and argument on that point are irrelevant. Having argued that the evidence helped to establish guilt, the state is hard placed to claim that it did not contribute to the verdict. Carter v. State, 560 So. 2d 1166 (Fla. 1990) (since woman died of asphyxiation, irrelevant evidence regarding gun and knife was harmless), cited by the state is irrelevant to the case at bar. Also beside the point is Lucas v. State, 568 So. 2d 18 (Fla. 1990). There, the defense opened the door to otherwise improper evidence on cross-examination. Here, it was the state which broached the improper subject.

Lucas is also irrelevant to the evidence concerning a feigned conversion to Christianity. In Lucas, the defense on cross-examination brought out evidence about threats made by the decedent to the defendant, which opened the door to questions about the same on

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[6] Bundy v. State, 471 So. 2d 9 (Fla. 1985) (flight evidence must be probative); O'Connel v. State, 480 So. 2d 1284 (Fla. 1986) (holding relevant evidence that defendant fled police and had murder weapon when caught); Tumulty v. State, 489 So. 2d 150 (Fla. 1986) (evidence of drug dealing "inextricably intertwined" with facts of murder of member of trafficking operation).

redirect. Here the defense did not bring out anything said when the officer visited Mr. Wyatt. Hence, it was improper to let the state recall the witness to testify to his belief that Mr. Wyatt had feigned a conversion to Christianity, a completely collateral matter. Carter is also irrelevant; it did not involve the sort of odious character evidence presented here.

Notwithstanding the state's claim, an objection that evidence is irrelevant preserves a claim regarding collateral misconduct evidence. See Smith v. State, 424 So. 2d 726, 731 (Fla. 1982). Relevance is the test for its admission, e.g. Ashley v. State, 265 So. 2d 685, 694 (Fla. 1972), and the rule of evidence governing it (section 90.404, Florida Statutes) is in the part of the Evidence Code governing relevance of evidence. Sapp v. State, 411 So. 2d 363 (Fla. 4th DCA 1982) says nothing to the contrary: there the lawyer said one thing at trial and argued the opposite on appeal. If anything, Sapp hurts the state: it cannot assert the contradictory positions that the evidence was relevant (and hence probative) and yet did not contribute to the verdict.

I. THE REASONABLE DOUBT INSTRUCTION

Under the state's cited authority of Sochor v. Florida, 619 So. 2d 285, 290 (Fla. 1993), an error is fundamental if it amounts to a denial of due process. An improper instruction on reasonable doubt amounts to a denial of due process. Sullivan v. Louisiana. Hence, the lack of objection cannot be a bar to appellate review.[7] See also Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985). Further, as already said, the

[7] The state's brief completely ignores the on point authority of Bennett v. State, 173 So. 817 (Fla. 1937).

contemporaneous objection rule has been so inconsistently applied that it cannot operate as a bar.

On the merits, Brown v. State, 565 So. 2d 304 (Fla. 1990) was decided before Cage v. Louisiana, 111 S.Ct. 328 (1990) and does not say what challenge was made to the instruction. Hence it does not affect Mr. Wyatt's argument.

J. THE STATE'S GUILT-PHASE ARGUMENT TO THE JURY

Unlike Ryan v. State, 457 So. 2d 1084 (Fla. 4th DCA 1984), the state's cases of Stewart v. State, 18 Fla. L. Weekly S294 (Fla. May 13, 1993) and Crump v. State, 18 Fla. L. Weekly S331 (Fla. June 10, 1993) did not involve such a pile of improper arguments as used at bar.

Kramer v. State, 18 Fla. L. Weekly S266 (Fla. April 29, 1993) does little for the state: the Court said that the argument came "perilously close" to the line; the argument here was much worse. Craig v. State, 510 So. 2d 857 (Fla. 1987) avails the state little: the prosecutor there called the defendant a liar; here the prosecutor called the defendant a con who was trying to pull a con job on the jury, said he was a proven liar who lies at the drop of a hat, a master of deceit who was trying to play the jury "off like a sucker like he did all these people along the way". Wasko v. State, 505 So. 2d 1314 (Fla. 1987) did not say what the challenged remarks were, and hence is of no value at bar.

II. PENALTY PHASE

A. FINDINGS OF AGGRAVATING CIRCUMSTANCES

In its brief, the state has not contested that the judge's recitation of Mr. McCoombs' testimony regarding the "avoiding arrest" and felony murder circumstances was completely erroneous. The state has not disputed that he did not give the testimony assigned to him by the trial judge. The trial court explicitly relied on this illusory evidence in sentencing Mr. Wyatt to death. Hence it contributed to the sentencing decision. Resentencing is required.

The state explicitly bases is argument for the avoiding arrest circumstance on "logical inferences," answer brief, page 21 (text and footnote), there being no direct evidence supporting it. "Logical inferences" cannot fill in the gaps: "the trial court may not draw 'logical inferences' to support a finding of a particular aggravating circumstance when the State has not met its burden. Clark v. State, 443 So. 2d 973, 976 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984)." Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993).

The state makes the spectacular and unsupported assertion that "Ms. Nydegger was raped". It also makes the unsupported claim that it was after only after the "rape" that she was driven to a desolate area. Answer brief, Page 21. The record shows only that, at some point, Michael Lovette had sex with Ms. Nydegger.

Bryan v. State, 533 So. 2d 744 (Fla. 1988), Harmon v. State, 527 So. 2d 182 (Fla. 1988), and Routly v. State, 440 So. 2d 1257 (Fla. 1983) do not support the state's argument on the avoiding arrest circumstance. In Bryan, the defendant removed the decedent to a remote location after the theft was effectively completed so that the "only conclusion" to be drawn was that he committed the murder to avoid

arrest for auto theft. The evidence here is that the killing was an afterthought.

Harmon is further off point: the decedent knew Harmon well, and was killed only after uttering Harmon's name. In Routly, the Court noted at page 1263 that proof of intent to avoid arrest must be very strong. It added at pages 1263-64 that the circumstance does not apply where it is unclear what events proceeded the murder; the court cannot assume the defendant's motive: the state must prove it.

The evidence does not support the avoiding arrest circumstance. As in Menendez v. State, 368 So. 2d 1278 (Fla. 1979) (discussed at length in Routly), the murder may have been based on any number of reasons. It was error to find the circumstance. See Dailey v. State, 594 So. 2d 254 (Fla. 1991) (striking circumstance; defendant removed 14-year-old girl to remote location, raped and murdered her); Geralds v. State, 601 So. 2d 1157 (Fla. 1992) (striking circumstance; defendant tied up women he knew and then killed her during course of burglary of her home); Jackson v. State, 599 So. 2d 103 (Fla. 1992).

The state rests its argument for the felony murder circumstance entirely on Duest v. State, 462 So. 2d 446 (Fla. 1985). In Duest, the defendant did not challenge the felony murder circumstance, and the opinion did not discuss it.[8] As in Clark v. State, 609 So. 2d 513 (Fla. 1992), the theft here was apparently an afterthought. Significantly, Mr. Wyatt was not even charged with auto theft.

As to the coldness circumstance, Parker v. State, 476 So. 2d 134 (Fla. 1985), Durocher v. State, 596 So. 2d 997 (Fla. 1992), and Stano v. State, 460 So. 2d 890 (Fla. 1984) do not help the state. In Parker

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[8] The evidence was that Duest spoke of his practice of robbing homosexuals, and that he said he was going to do so when he went off to commit the murder.

and Durocher the defendants said they killed with a cold-blooded deliberate intent to eliminate witnesses. In Stano, the defendant struck the victim, then drove him to a remote location to finish him off. At bar, the evidence is that the killing was an afterthought. See Gore v. State, 599 So. 2d 978, 986 (Fla. 1992):

> To establish the heightened premeditation necessary for a finding of this aggravating factor, the evidence must show that the defendant had "a careful plan or prearranged design to kill." [Citations omitted.] Here, the evidence established that Gore carefully planned to gain Roark's trust, that he kidnapped her and took her to an isolated area, and that he ultimately killed her. However, given the lack of evidence of the circumstances surrounding the murder itself, it is possible that this murder was the result of a robbery or sexual assault that got out of hand, or that Roark attempted to escape from Gore, perhaps during a sexual assault, and he spontaneously caught her and killed her. There is no evidence that Gore formulated a calculated plan to kill Susan Roark. We therefore conclude that the State has failed to establish the existence of this aggravating circumstance beyond a reasonable doubt.

Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992) is similar:

> The State contends that the evidence at trial established more than simple premeditation. The State argues that Geralds planned the crime for a week after interrogating the Pettibone children in the mall; Geralds ascertained when family members would be present in the house; Geralds brought gloves, a change of clothes, and plastic ties with him to the house; Geralds left his car at a location away from the house so that no one would see it or identify it later; Geralds bound and stabbed his victim.
>
> Geralds argues that this evidence establishes, at best, an unplanned killing in the course of a planned burglary, and that a planned burglary does not necessarily include a plan to kill. Geralds offers a number of reasonable hypotheses which are inconsistent with a finding of heightened premeditation. Geralds argues, first, that he allegedly gained information about the family's schedule to avoid contact with anyone during the burglary; second, the fact that the victim was bound first rather than immediately

> killed shows that the homicide was not planned; third, there was evidence of a struggle prior to the killing; and fourth, the knife was a weapon of opportunity from the kitchen rather than one brought to the scene.
>
> Thus, although one hypothesis could support premeditated murder, another cohesive reasonable hypothesis is that Geralds tied the victim;'s wrists in order to interrogate her regarding the location of money which was hidden in the house. However, after she refused to reveal the location, Geralds became enraged and killed her in sudden anger. Alternatively, the victim could have struggled to escape and been killed during the struggle.
>
> In light of the fact that the evidence regarding premeditation in this case is susceptible to these divergent interpretations, we find the State has failed to meet its burden of establishing beyond a reasonable doubt that this homicide was committed in a cold, calculated, and premeditated manner. Consequently, the trial court erred in finding this aggravating circumstance.

See also Happ v. State, 596 So. 2d 991 (Fla. 1992) (striking circumstance where defendant abducted woman from parking lot, took her to canal, beat, raped, and strangled her).

B. FAILURE TO CONSIDER OR WEIGH MITIGATION

Lucas v. State, 613 So. 2d 408 (Fla. 1992) does not help the state. It involved a remand where the initial sentencing decision was unclear. On the new appeal, the defense complained of failure to find three mitigating circumstances, two of them not advanced below, and the other of no significance. Floyd v. State, 569 So. 2d 1225, 1233 (Fla. 1990) concerned argument that the trial court had counted, rather than weighed the circumstances. In Sochor, the court wrote that deciding whether evidence of "family history establishes mitigating circumstances is within the trial court's discretion." 619 So. 2d at 293. Sochor did not purport to overrule the principles that the trial court must consider all mitigation in the record and must weigh all

unrebutted mitigation. If it did overrule these principles, Farr v. State, 18 Fla. L. Weekly S380 (Fla. June 24, 1993), restored them.

C. JURY INSTRUCTIONS

1. In Parker v. State, 476 So. 2d 134 (Fla. 1985), the defendant told the victim she would be killed; she pleaded, she knew she would die. The evidence here is quite different. Hence, it was error to instruct on the heinousness circumstance.

Haliburton v. State, 561 So. 2d 248 (Fla. 1991) and Stewart v. State, 558 So. 2d 416 (Fla. 1990) do not advance the state's cause. In Haliburton the decedent was in bed when attacked without provocation; while vainly trying to defend himself, he was stabbed 31 times all over, including the scrotum. Hence, this Court reasoned, the evidence supported the HAC instruction. In Stewart, the evidence also supported instruction on the coldness circumstance.

While in Sochor v. Florida, 112 S.Ct. 2114 (1992) the Court would not assume that the jury would apply a circumstance not supported by the record, it was clear that no reasonable jury could find that the murder was "cold." At bar, the jury was not aware that our law forbids application of the heinousness circumstance to the sort of single shot murder at bar. Having vigorously argued to the jury that the circumstance applied to such facts, the state cannot now argue that jurors could not have used it in the improper manner urged by the state.

Unhelpful to the state is Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993), which involved a request for stay of execution and other claims for extraordinary relief. The Court noted there that it may be error to instruct on a circumstance not supported by the evidence. Id. 577, n.2. As Johnson noted, a jury is unlikely to disregard a theory flawed in law; at bar, the state presented to the jury a theory flawed

in law: it improperly argued that the heinousness circumstance applies to a single shot to the head without evidence of torturous intent. This is not a case like Johnson v. State, 608 So. 2d 4 (Fla. 1992) where the prosecutor hardly mentioned the circumstance to the jury.

The state's argument that the constitutionality of the instruction is barred is incorrect. As shown above, Florida was so inconsistent in its application to procedural bars at the time of this trial that it cannot bar Mr. Wyatt's claim. Indeed, Mr. Espinosa himself made no constitutional objection to the heinousness instruction at trial, as the state well knows.[9]

The instruction at bar simply tracked the definitions found insufficient in Shell v. Mississippi, 492 U.S. 1 (1990). Although it contains a reference to the "conscienceless or pitiless crime which is unnecessarily torturous," it does not limit the circumstance to such cases. Hence it is unconstitutional. The trial court should have sustained the defense objection.

2. Again, the state's argument of procedural default must fall given the lack of consistency in application of procedural defaults to jury instructions. Further, the jury instruction issues raised here amount to a denial of due process so that the fundamental error doctrine must apply.

The state has offered no explanation of our statute and procedure ccomports with Mills v. Maryland, 486 U.S. 367 (1988) and McKoy v. North Carolina, 110 S.Ct. 1227 (1990).

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[9] It so argues in its brief before this Court in Mr. Espinosa's case.

D. CONFRONTATION CLAUSE AND CUMULATIVE EVIDENCE

As to the state's argument that there was no hearsay objection, consider the following:

> MR. SIDAWAY [defense counsel]: Objection, hearsay.
>
> MR. MORGAN [prosecutor]: Your Honor, hearsay is clearly admissible as long as it's fairly rebuttable and all these witnesses have been deposed by the defendant.
>
> THE COURT: Objection is overruled.

R 2072.

> MS. HORNE [defense counsel]: I'm going to object. This is double hearsay.
>
> MR. MORGAN: I have some law I'd like to present on that.
>
> THE COURT: I'll overrule the objection. I agree it is double hearsay but I believe it is allowable.

R 2110.

> MR. SIDAWAY: Excuse me, I don't mean to interrupt. Could we have a continuing objection as far as the hearsay?
>
> THE COURT: Okay, and the same ruling of the Court. Go ahead.

R 2136.

Given the foregoing, the state's claim of procedural default must fail. The state has made no effort to explain away Specht v. Patterson, 386 U.S. 605 (1967), Gardner v. Florida, 430 U.S. 349 (1977), and Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989), which govern the Confrontation Clause claim.

Given its extensive use of hearsay evidence in its argument to the jury, the state understandably has waived any claim that the error was harmless. See Cannady, U.S. v. Giovanetti, Carter v. Kentucky.

The state makes no effort to meet, and therefore waives, the issue regarding use of the photographs and cumulative evidence of the prior violent felonies. Again, given its pervasive use in argument to the jury, it has quite sensibly waived any claim of harmless error.

E. THE PROSECUTOR'S PENALTY PHASE ARGUMENT

Crump v. State, 18 Fla. L. Weekly S331 (Fla. June 10, 1993) and Breedlove v. State, 413 So. 2d 1 (Fla. 1982) do not help the state. Crump provides that improper argument going to the merits of the case will constitute fundamental error. Both cases say that resentencing will result when improper argument has likely influenced the verdict.

Without attempting to distinguish the cases in the initial brief, the state relies on Freeman v. State, 563 So. 2d 73 (Fla. 1990), Craig v. State, 510 So. 2d 857 (Fla. 1987), and Valle v. State, 581 So. 2d 40 (Fla. 1991) which involved arguments not coming close to the extensively improper argument at bar. Likewise Hodges v. State, 595 So. 2d 929 (Fla. 1992) and Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986) involved minimal improprieties. The harmless error discussion in those cases was inadequate.

F. CONSTITUTIONALITY OF SECTION 921.141

The state's argument of procedural default, premised on Johnson v. State, 612 So. 2d 575 (Fla. Jan. 28, 1993), is erroneous: Johnson involved a challenge to jury instructions alone, not to the constitutionality of the statute itself.

CONCLUSION

This Court should reverse the conviction and death sentence or grant such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA TERENZIO, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier, this 3 day of September, 1993.

Of Counsel

IN THE SUPREME COURT OF FLORIDA

THOMAS WYATT,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. 79,245
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	
	)	

APPENDIX TO REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court of the Nineteenth Judicial Circuit of Florida.

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,765

MAX FENELON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

****

AN APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, CRIMINAL DIVISION

****

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF AUTHORITIES

CASES

PRELIMINARY STATEMENT

Max Fenelon was the defendant below and will be referred to as "petitioner" in this brief. The State of Florida will be referred to as "respondent." References to the record will be preceded by "R."

STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with petitioner's statement of the case and facts, with the following additions, clarifications or exceptions.

Rally's restaurant is approximately three blocks from the murder scene (R 370). Both interviewing detectives testified that defendant was not threatened, beaten or brutalized (R 366, 437, 603). Petitioner stated that he was making the taped confession voluntarily (R 388). He was not promised anything or tricked into making the statement (R 388, 389).

In his statement to the police, petitioner said that the plan was to kidnap the victim, force her to reveal the location of the money, and rob her (R 372, 394).

In his brief, petitioner states that "The police again expressed their dissatisfaction with this story. (R 374)." The officer actually testified that he told petitioner that what petitioner said was not consistent with information they had learned in their investigation. The officer also said that he confronted petitioner with the inconsistencies in his story (R 373-74).

Petitioner stated that he was holding the gun and the victim grabbed the gun and it discharged into the victim's neck (R 374). Detective Mangifesta told petitioner that his story was inconsistent with the evidence because there were no powder burns or marks on the victim's hands (R 375). Petitioner then said that someone else came up behind him and

pushed his hand toward the victim's neck causing the gun to discharge. This occurred while Paul Jerome was in the passenger seat of the victim's car placing a plastic bag over the victim's head (R 376-77). Petitioner then ran away (R 377).

In petitioner's taped statement, petitioner said that he had the gun (R 399). He went up to the car and told the victim, "Stay right there don't move." (R 399). The victim grabbed at his hand and the gun discharged (R 399). The plan was to kidnap the victim (R 394, 402). After the shooting, he ran toward Rally's (R 400, 403). Petitioner told his cousin that he shot the victim (R 404).

In each of the versions he gave police, petitioner started with the initial plan of petitioner and Jerome Paul robbing the victim (R 374). In each of the versions petitioner said that he ran away (R 377).

A photograph taken after petitioner had confessed indicated no injuries (R 426-31). Petitioner was arrested and confessed on August 17, 1988 (R 358). The photographs showing bruises were taken on August 23, 1988 (R 464).

Respondent reserves the right to include additional facts in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

I

There was more than adequate evidence to instruct on flight. Petitioner admitted to the crimes and told many others of his plans and actions. He was seen running from the location of the murder with a gun. Additionally, this issue was not preserved for review and any error was harmless.

POINT I

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON FLIGHT.

At trial, defense counsel made a general objection to the flight instruction ("I, of course, object to that flight instruction.")(R 588). After the instruction was given, he made another general objection ("And I re-raise all of my prior objections to the jury instructions.")(R 720). He never stated the specific grounds for the objection. Accordingly, this issue was not preserved for review. See Fla. R. Crim. P. 3.390(d) (party may not assign as error on appeal the giving of a jury instruction unless before the jury retires he objects, stating distinctly the matter to which he objects and the grounds of his objection); Craig v. State, 510 So.2d 857, 865 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 732, 98 L.Ed.2d 680 (1988) ("objections to instructions and the legal grounds therefore must be specifically stated before the jury retires in order for the objection to be reviewable on appeal. . ."); Thomas v. State, 419 So.2d 634, 636 (Fla. 1982) (Rule 3.390(d) satisfied if trial judge is fully aware that an objection has been made and the specific grounds for the objection are presented to the trial judge); State v. Heathcoat, 442 So.2d 955, 956-57 (Fla. 1983) (same) See also Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982) (in order for issue to be cognizable on appeal it must be the specific contention asserted below as the ground for objection); Castor v. State, 365 So.2d 701, 703

(Fla. 1978) (objection must be sufficiently specific to apprise the trial judge of the putative error) and Hamilton v. State, 458 So.2d 863, 865 (Fla. 4th DCA 1984) (grounds for objection presented to the trial court must be specific so that the trial judge can appreciate the problem being presented).

Assuming arguendo that this issue was preserved for review, there was no error. Petitioner argues that the record establishes nothing more than his departure from the scene of the murder (initial brief p. 11). This is incorrect. Herard Martelus testified that on the morning of the murder, petitioner came in his business and said he was going to "jack" someone (R 219). Martelus took that to mean that petitioner was planning to rob someone (R 219). Petitioner had a gun at the time (R 220-22).

Betty George testified that on the day of the murder she saw petitioner run past Rally's restaurant where she was working (R 313). He was coming from 4th Avenue (R 315). She was certain that she saw the handle of a gun sticking out from his pocket (R 315, 323).

Later that day petitioner told her about the murder (R 318). He said that he and some other men were trying to rob the victim (R 318). Petitioner had the gun pointed at the victim (R 318). He and another man started fighting over the gun and it went off (R 318-19).

Betty George testified that petitioner apologized to her for saying she was too fat." She accepted the apology and

they were friends again that day (R 327).

Mona Lisa Rolle testified that the day of the murder she was working at Rally's (R 343). Petitioner called her across the street to tell her he was in trouble (R 343). He said that a lady had been shot (R 343). He was holding a gun and it went off (R 344). Petitioner gave her a slip and asked her to pick up some photographs for him at a nearby business (R 345). Petitioner looked very scared when Rolle saw him (R 354). She did not have anything against petitioner (R 354).

Petitioner stated that two weeks before the murder, a man asked him to help rob the victim (R 371). Part of the plan was to kidnap the victim (R 372, 402). Paul Jerome was putting a plastic bag over the victim's head when the gun was fired (R 374-75). Petitioner admitted holding the gun when it fired and then running away (R 376-77, 399-400). He gave at least three different stories why the gun discharged (answer brief pp. 2-3). He was scared and crying when he was running (R 403). He ran past Rally's (R 313, 400, 403). He ran home (R 410). He then said, "I never stop (Unintelligible) I say, God, I don't want to hide. The police, I go to jail. How am I going to get out of this thing.[sic]" (R 410).

From the above, it is clear that there was more than enough evidence to instruct on flight. See Whitfield v. State, 452 So.2d 548, 549-50 (Fla. 1984) (flight instruction proper "where there is significantly more evidence against defendant than flight standing alone.") and

Proffitt v. State, 315 So.2d 461, 466 (Fla. 1975), affirmed, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (same).

In Proffitt, the defendant was charged with the murder of Joel Ronnie Medgebow. Medgebow's wife was awakened and saw her husband propped up on one elbow with a knife in his hand. Suddenly, a man jumped up and struck her in the face and fled through the sliding glass doors. The defendant's fingerprints were not found at the scene. The decedent's wife gave a description of her attacker similar to the defendant, but could not identify the defendant at trial. A tenant at the defendant's mobile home was awakened that morning, overhearing a conversation between the defendant and his wife. The tenant testified that she heard the defendant say that he had stabbed a man during an attempted robbery and had beaten a woman. Id. at 463. This Court found sufficient evidence to support the flight instruction, citing the testimony of the tenant, a phone call made by the defendant's wife to the police, and the flight itself. Id. at 466.

Jackson v. State, 575 So.2d 181 (Fla. 1991), relied on by petitioner, is inapposite. In Jackson, there was no evidence that the defendant ran from the store that was the scene of crime. He was only observed driving from the general direction of the crime, possibly in excess of the speed limit. Id. at 188-89.

Finally, assuming arguendo that there was error, it was harmless. See Rhoades v. State, 547 So.2d 1201, 1203 (Fla. 1989) (incorrectly giving jury instruction on flight in death

penalty case, harmless error); Schaefer v. State, 537 So.2d 988, 991 (Fla. 1989) (incorrectly giving objected to instruction on flight in first degree murder and robbery case, harmless error) and Self v. State, 528 So.2d 526 (Fla. 2d DCA 1988) (same). The evidence against petitioner was overwhelming. He confessed to the crimes. Petitioner even admits in his brief that he fled the scene of a murder (initial brief p. 11).

The jury instruction merely stated that if the jury members found that petitioner fled the scene, they may give it as much weight as they deem appropriate (R 707-08). If anything, the instruction benefitted petitioner. See Haywood v. State, 466 So.2d 424, 426 (Fla. 4th DCA 1985), approved, 482 So.2d 1377 (Fla. 1986).

CONCLUSION

Based on the preceding argument and authorities, this Court should affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of this document has been furnished by courier to Tanja Ostapoff, Assistant Public Defender, Governmental Center, 9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, 33401, this 13 day of November, 1991.

Of Counsel